

Attorney for Plaintiffs

AIRFX.com and Marc Lurie,

VS.

AirFX, LLC, an Indiana LLC

Defendant

) Case No.: 2:11-cv-01064-FJM

PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS
AND/OR TRANSFER VENUE

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3 A. Michael Froomkin,
4 *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*,
5 50 Duke L.J. 17 (2000) 4

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**PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS AND/OR TRANSFER VENUE**

Plaintiffs AIRFX.com and Marc Lurie (collectively the "Plaintiffs," individually "Plaintiff"), by and through their undersigned attorney, file this Opposition to Defendant's Motion to Dismiss and/or Transfer (Doc. # 10) (the "Motion"). Defendant has not articulated a basis for dismissal of his claim, and transfer of this action to the Southern District of Indiana is improper – in addition to being specifically waived by Defendant in the Uniform Domain Name Dispute Resolution Policy ("UDRP") proceeding upon which this action is predicated. Accordingly, the Court should deny Defendant's Motion (Doc. # 10) on all bases.

I. Introduction

Marc Lurie, an inventor and entrepreneur, brought this action to vindicate his rights in the <airfx.com> domain name (the "Domain Name"), and the AIRFX brand for indoor skydiving equipment. Defendant has attempted to use a domain name arbitration to wrest this valuable property away from Lurie, simply because the Defendant wants it without paying for it. This Action employs the Reverse Domain Name Hijacking (RDNH) portion of the Lanham Act, found at 15 U.S.C. § 1114(2)(D)(v), which gives the Plaintiff standing to seek a declaratory judgment from this Court that Lurie has not violated the Anticybersquatting Consumer Protection Act (ACPA), found at 15 U.S.C. § 1125(a). If this court finds that Lurie has not violated the ACPA, this will function as an adjudication of Lurie's right to continue to own the <airfx.com> domain name.

The Defendant's Motion to Dismiss (Doc. # 10) mischaracterizes the settled law and documented facts of the case. The Motion provides conclusory factual and legal positions, but fails to provide any support for them. The section devoted to seeking a dismissal under Fed. R.

Civ. P. 12(b)(6) fails to cite a single piece of binding authority. Defendant mischaracterizes the action as an “appeal from judgment,” which it is not. See *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 374 (2d Cir. 2003) (domain-name registrant's claim under 15 U.S.C. § 1114(2)(D)(v) does not involve review of a UDRP decision, it is a simple declaratory judgment that the Plaintiff has not violated the ACPA). The Defense claims that it is the “undisputed owner of the federal trademark AirFX,” but fails to note that trademarks are not simply in-gross rights to a string of letters, but are only enforceable for the goods and services to which they are attached. Most bizarrely, the Defense complains that this action was brought in the District of Arizona, when it was the Defendant who chose this jurisdiction for the resolution of this dispute, not the Plaintiff.

Plaintiffs have properly brought this action before the court under 15 U.S.C. § 1114(2)(D)(v). Plaintiffs have also properly pled their claim for reverse domain name hijacking (Doc. # 1 ¶¶ 46-77). In addition to not being supported by law, Defendant is estopped from contesting venue and jurisdiction, as it specifically selected this jurisdiction for this dispute’s resolution. The Motion must be denied.

II. The ACPA, the UDRP, and RDNH

a. The Anti-Cybersquatting Consumer Protection Act and Reverse Domain Name Hijacking

When Congress passed the ACPA, the purpose was primarily to prohibit cybersquatting, but the Act also provides protection to domain name registrants against “overreaching trademark owners” who “reverse hijack” a domain name from a registrant where the registrant’s actions were lawful. *Ricks v. BMEzine.com, LLC*, 727 F. Supp. 2d. 936 (D. Nev. 2010) (citing *Barcelona.com, Inc. v. Excelentísimo Ayuntamiento De Barcelona*, 330 F.3d 617, 625 & n.1 (4th

1 Cir. 2003) (quotations omitted). The Reverse Domain Name Hijacking provision is found at 15
 2 U.S.C. § 1114(2)(D)(v), and it provides as follows:

3 A domain name registrant whose domain name has been suspended, disabled, or
 4 transferred under a policy described under clause (ii)(II) [e.g., the the UDRP]
 5 may, upon notice to the mark owner, file a civil action to establish that the
 6 registration or use of the domain name by such registrant is not unlawful under
 this chapter. The court may grant injunctive relief to the domain name registrant,
 including the reactivation of the domain name or transfer of the domain name to
 the domain name registrant.

7 To prevail on a reverse hijacking claim, the domain name registrant must show “(1) that
 8 it is a domain name registrant; (2) that its domain name was suspended, disabled, or transferred
 9 under a policy implemented by a registrar as described in 15 U.S.C. § 1114(2)(D)(ii)(II); and (3)
 10 that the owner of the mark that prompted the domain name to be suspended, disabled, or
 11 transferred has notice of the action by service or otherwise.” *Barcelona.com, Inc.*, 330 F.3d at
 12 626. Additionally, the registrant must show that its registration or use of the domain name is not
 13 unlawful under the 15 U.S.C. § 1125(d). *Ricks*, 727 F. Supp. 2d at 959 (“The Court [...]”
 14 concludes that to satisfy the ACPA’s requirement that a domain name registrant show that its
 15 conduct was not unlawful under ‘this Act,’ it must show its conduct was not unlawful under only
 16 the ACPA, not the entire Lanham Act.”). See also *Sallen v. Corinthians Licenciamentos LTDA*,
 17 273 F.3d 14, 18 (1st Cir. 2001) (describing a reverse hijacking claim as one “for a declaration of
 18 nonviolation of the ACPA” or 15 U.S.C. § 1125(a)).

19 *b. Relevant Provisions of the UDRP*

20 The Internet Corporation for Assigned Names and Numbers (“ICANN”) has
 21 promulgated, and the vast majority of domain name registrars have adopted¹ the Uniform

22 _____
¹ The concerned registrar in the instant case, GoDaddy.com, Inc., has adopted the UDRP for all “.com” domain
 names registered through its service, and all affected registrants are required to accept the initial jurisdiction of an
 accredited arbitration panel for domain name disputes. See Section 5, GoDaddy.com Domain Registration

Domain-Name Dispute-Resolution Policy or “UDRP” as a potential mechanism for resolving multiple claims to the same domain name – which can only have one registrant at a time. The UDRP provides a set of rules² and policies³ that are applied by a domain name panelist to determine if the domain name should be taken from the registrant and given to the complainant. The UDRP arbitration process is an *ex-parte* proceeding⁴ designed to be a fast and inexpensive alternative to litigation. However, the UDRP has been criticized as providing inadequate due process protections. See A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 Duke L.J. 17, 29 (2000). It is for this reason that the ACPA contains the Reverse Domain Name Hijacking provision 15 U.S.C. § 1114(2)(D)(v) – so that an American respondent in a UDRP proceeding, who finds his rights violated, can institute a *de novo* proceeding in federal court, where his due process rights will be protected.

Any party filing a UDRP complaint is required to recognize a right of a respondent to institute a new proceeding to overturn the UDRP decision. The UDRP mandates that the complainant in the proceeding (in this case, the Defendant in this action) must choose a “mutual jurisdiction” in which it will submit to a *de novo* action seeking to overturn the panelist’s decision. The complainant has the privilege of selecting this “mutual jurisdiction,” under the UDRP.⁵ The complainant may select either the jurisdiction where the domain name registrant resides, or (if the complainant wishes to inconvenience the registrant) the location of the

Agreement, available at http://www.godaddy.com/agreements/showdoc.aspx?pageid=REG_SA (last visited Sept. 13, 2011).

² See UDRP Rules, available at <http://www.icann.org/en/dndr/udrp/uniform-rules.htm> (last visited Sept. 13, 2011).

³ See UDRP Policy, available at <http://www.icann.org/en/dndr/udrp/policy.htm> (last visited Sept. 13, 2011).

⁴ See UDRP Rule 13 (“There shall be no in-person hearings (including hearings by teleconference, videoconference, and web conference), unless the Panel determines, in its sole discretion and as an exceptional matter, that such a hearing is necessary for deciding the complaint.”).

⁵ See UDRP Rule 3(b)(xiii) (“State that Complainant will submit, with respect to any challenges to a decision in the administrative proceeding canceling or transferring the domain name, to the jurisdiction of the courts in at least one specified Mutual Jurisdiction”).

1 registrar.⁶ The practical result of these various provisions is that UDRP arbitration is not
 2 intended to be binding or final, and when court cases are filed to challenge the arbitration
 3 decision, they are brought in a venue of the Complainant's choosing.⁷ In this case, the
 4 Defendant was the Complainant, and the Defendant chose the District of Arizona as its preferred
 5 jurisdiction.

6 In the interest of expediency, the UDRP does not include a full adversarial proceeding,
 7 complete with discovery, oral argument, or any of the other safeguards that are designed to
 8 ensure an equitable result. Moreover the process is ripe for abuse, as "information and belief"
 9 statements and similar evidentiary submissions are not subject to the penalty of perjury, which
 10 Defendant used to its advantage. The entire finding is usually based only on two documents: the
 11 complaint filed by the complainant, and the response filed by the respondent. To counterbalance
 12 this abbreviated dispute-resolution process, and to account for the possibility that occasionally
 13 the arbitration panel – not having the benefit of a developed record – may come to an erroneous
 14 conclusion, the UDRP specifically contemplates that a registrant may, prior to execution of the
 15 panel's decision to transfer the domain name away from him or her, file a lawsuit in the mutual
 16 jurisdiction selected by the UDRP complainant – the Defendant in this case – seeking relief for
 17 reverse domain name hijacking.⁸ In the subsequent judicial proceedings, the parties then
 18

19 ⁶ See UDRP Rule 1 (defining "Mutual Jurisdiction" as "a court jurisdiction at the location of either (a) the principal
 20 office of the Registrar . . . or (b) the domain-name holder's address as shown for the registration of the domain name
 in Registrar's Whois database at the time the complaint is submitted to the Provider").

21 ⁷ See UDRP Policy 4(k) ("The mandatory administrative proceeding requirements set forth in [this] Paragraph 4
 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for
 independent resolution before such mandatory administrative proceeding is commenced **or after such proceeding is**
concluded." (emphasis added)).

22 ⁸ See UDRP Policy 4(k) ("If an Administrative Panel decides that your domain name registration should be canceled
 or transferred, we [the registrar] will wait ten (10) business days (as observed in the location of our principal office)
 after we are informed by the applicable Provider of the Administrative Panel's decision before implementing that
 decision. We will then implement the decision unless we have received from you during that ten (10) business day
 period official documentation (such as a copy of a complaint, file-stamped by the clerk of the court) that you have

1 challenge the sufficiency of one another's factual assertions, provide testimony as required, and
 2 take full advantage of the adversarial process to reach a thorough determination of the operative
 3 facts and law as applied to them. As discussed below, when a challenge is brought, the UDRP
 4 panel's decision is given zero weight.⁹

5 *c. An RDNH claim is not an "appeal," it is a de novo action.*

6 Although the Defense attempts to paint this action as an "improper appeal," the Defense
 7 completely mischaracterizes this proceeding. See, e.g., *Hawes v. Network Solutions, Inc.*, 337
 8 F.3d 377, 386 (4th Cir. 2003) ("An action brought under § 1114(2)(D)(v) on the heels of an
 9 administrative proceeding [under the UDRP]. . . is independent of, and involves neither
 10 appellate-like review of nor deference to, the underlying proceeding."). See also *Storey*, 347
 11 F.3d at 382. ("We agree with the First and Fourth Circuits that a claim brought by a domain
 12 name registrant under § 1114(2)(D)(v) seeks 'a declaration of nonviolation of the ACPA,' not
 13 requiring (or permitting) review of the UDRP panel's application of the UDRP's cybersquatting
 14 standard, but instead 'trump[ing] the panel's finding of noncompliance.'") (citing *Sallen* and
 15 *Hawes*). This is not an "appeal." This is a new action, seeking a declaration that the Plaintiff did
 16 not violate 15 U.S.C. § 1125(d). If the Court so finds, then Mr. Lurie keeps his property.

17 Bringing an RDNH claim bears no relationship to an action seeking to overturn a regular
 18 arbitration award. No findings by the UDRP panel are given any weight; a federal court gives a
 19 UDRP panelist's findings no deference when deciding an action under § 1114(2)(D)(v).

21 commenced a lawsuit against the complainant in a jurisdiction to which the complainant has submitted under
 Paragraph 3(b)(xiii) of the Rules of Procedure").

22 ⁹ See *Sect. II.d. infra*. See also *Weber-Stephen Products Co. v. Armitage Hardware and Building Supply, Inc.*, 2000
 U.S. Dist. LEXIS 6335 at *7, 54 U.S.P.Q.2d 1766 (N.D. Ill. 2000) ("We conclude that this Court is not bound by the
 outcome of the ICANN administrative proceedings."); see also *Parisi v. Netlearning, Inc.*, 139 F. Supp. 2d 745, 752
 (E.D. Va. 2001); *Broadbridge Media LLC v. Hypercd.com*,
 106 F. Supp. 2d 505, 509 (S.D.N.Y. 2000).

1 *Barcelona.com*, 330 F.3d at 626; *Super-Krete Int'l, Inc. v. Sadleir*, 712 F. Supp. 2d 1023 (C.D.
2 Cal. 2010) (“the findings of the WIPO panel are entitled to no deference here”).

3 The UDRP decision is only relevant to the extent that it triggers Mr. Lurie’s right to sue
4 under § 1114(2)(D)(v). *Storey*, 347 F.3d at 383. See also *Barcelona.com*, 330 F.3d at 626
5 (UDRP panel decision “is relevant only to serve as the reason for [registrant’s] bringing an action
6 under § 1114(2)(D)(v)”; *Dluhos v. Strasberg*, 321 F.3d 365, 373-74 (3d Cir. 2003) (holding that
7 15 U.S.C. § 1114(2)(D)(v) requires the federal court to approach the issues raised in an action
8 brought under that provision *de novo* rather than to apply the deferential review appropriate to
9 actions governed by the Federal Arbitration Act); *Sallen*, 273 F.3d at 28 (explaining that “a
10 federal court’s interpretation of the ACPA supplants a [UDRP] panel’s interpretation of the
11 UDRP”). Thus, for this Court’s purposes, the UDRP panelist’s decision is relevant only to serve
12 as the reason for the Plaintiff to assert jurisdiction under § 1114(2)(D)(v).

13 **III. Procedural History**

14 Defendant was provided with a copy of the complaint on May 26, 2011. On July 4, 2011,
15 Defendant’s counsel was provided with a proper waiver of service of process with prepaid return
16 envelope. After giving more than the thirty days required by Federal Rule of Civil Procedure
17 4(d)(1)(F) and having not receiving an executed service waiver, on August 11, 2011, Plaintiff
18 effected formal service of process (Doc. # 7). Subsequently, Defendant returned the waiver of
19 service form by email only in an attempt to waive formal service after completed. On September
20 2, 2011, Defendant submitted its Motion to Dismiss (Doc. # 10).

21 **IV. Argument**

22 Defendant has failed to establish that Plaintiffs’ Complaint should be dismissed under
Rule 12(b)(6). Plaintiffs’ Complaint properly alleges all of the elements required to plead a

claim for reverse domain name hijacking. 15 U.S.C. § 1114(2)(D)(v). The Complaint and its exhibits plainly establish this. Indeed, based on what is already in the record, the court could properly find as a matter of law that the Plaintiff did not violate 15 U.S.C. § 1125(d).

It is nonsense to suggest that this dispute should be transferred to Indiana. The Defendant has not only *consented* to jurisdiction in this Court, but the Defendant *insisted* upon this jurisdiction. (Doc. # 1-2 ¶ 11). Even if this were not the case, the Defense's assertion that "[t]he convenience of every single party and witness favors transfer of this action" is presented without support – as none exists. No facts have been produced to show that Jurisdiction is actually favorable for the Defendant's witnesses; in contrast, there is evidence that such a far-flung jurisdiction would be undesirable for Plaintiffs and their witnesses. For example, there are witnesses who will show that the Defendant's AIRFX trademark's lacks distinctiveness. These witnesses are located throughout the country, but primarily in the Southwestern states. Travel to a tertiary airport such as Indianapolis, rather than a major airport hub like Phoenix is clearly more inconvenient for virtually all relevant parties.

a. Plaintiffs Have Properly Alleged a Claim for Reverse Domain Name Hijacking Under 15 U.S.C. § 1114(2)(D)(v), thus Dismissal Under FRCP 12(b)(6) is Improper.

Dismissal under Rule 12(b)(6) is disfavored. *See Gilligan v. Jamco Dev. Corp.*, 108 F.3d 256, 249 (9th Cir. 1997); *United States v. Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981); *Cauchi v. Brown*, 51 F. Supp. 2d 1014, 1016 (E.D. Cal. 1999). A complaint will survive a motion to dismiss if it contains sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)).

Defendant moves to dismiss the claim under Fed. R. Civ. P. 12(b)(6), but fails to cite a single piece of authority in support of its position. Even if the Plaintiff simply filed a one-page statement refusing to consent to granting the Motion, it would be proper of this Court to rule in the Plaintiff's favor. *See In re Martin-Trigona*, 795 F.2d 9 (2d Cir. 1986) (denying party's motions even when unopposed); *see also Zimmerman v. Burge*, Case No. 06-cv-0176 2008 U.S. Dist. LEXIS 25154 at *8-9 (N.D.N.Y. Mar. 28, 2008) (finding that even when a motion is unopposed, the district court must decide whether the movant prevails, citing *Vt. Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 242 (2d Cir. 2004)). However, the Plaintiff will provide the Court with ample support upon which it can rely to deny this frivolous motion.

Plaintiffs' Complaint (Doc. # 1) is sufficient to move forward. Plaintiff Lurie alleges that he is the Domain Name's registrant (*Id.* ¶¶ 48-49). The Domain Name's transfer would be an inevitability but for this action, which is accorded legal equivalency with being *actually* transferred, suspended or disabled in cases such as the one at bar.¹⁰ (*Id.* ¶¶ 50-52) Defendant was notified of this action at the time it was filed, and later by service of the Complaint upon it. (*Id.* ¶¶ 53-54; Doc. # 7.) Finally, Plaintiff has alleged that its use of the Domain Name was not in violation of the ACPA (Doc. # 1 ¶¶ 55-59).

Under the standard set forth in 15 U.S.C. § 1114(2)(D)(v), and clarified in *Barcelona.com*, 330 F.3d at 626, and *Ricks*, 727 F. Supp. 2d at 936, Plaintiffs have alleged all of

¹⁰ Courts have found that domain names scheduled to be transferred or cancelled as a result of UDRP proceedings are treated as if they have been transferred or cancelled, as such an outcome is "inevitable" without judicial intervention. *Sallen*, 273 F.3d at 25-26 n. 11. A reverse domain name hijacking complaint is properly brought where a Plaintiff has wrongfully lost a UDRP proceeding, as UDRP ¶ 4(k) compels the transfer of the domain name unless an appeal is brought under 15 U.S.C. § 1114(2)(D)(ii)(II). *Id.*; *accord Ricks*, 727 F. Supp. 2d at 936 (proceeding with reverse domain name hijacking litigation filed following an adverse UDRP decision, but before a transfer occurred). A UDRP decision requiring the transfer or cancellation of a domain name - even where such transfer or cancellation has not occurred - "triggers the right to sue." *Mann v. AFN Invs., Ltd.*, Case No. 07-cv-0083-BEN (CAB), 2007 U.S. Dist. LEXIS 54582 at *7 (S.D. Cal. July 27, 2007). Accordingly, the lack of the domain name's actual transfer is not an impediment in this case.

1 the elements required to establish a claim for reverse domain name hijacking. Defendant's
2 Motion fails.

3 *b. Defendant Not Only Consented to This Court's Jurisdiction, but actually Selected*
4 *it Rendering its arguments for Transfer of Venue Improper.*

5 Forum selection clauses are favored and enforced by Courts, and necessary in this case to
6 determine the proper venue for Plaintiff to file suit to derail the implementation of the UDRP
7 decision. 15 U.S.C. § 1114(2)(D)(v); *Swenson v. T-Mobile USA, Inc.*, 415 F. Supp. 2d 1101,
8 1104 (S.D. Cal. 2006) (quoting *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741
9 F.2d 273, 280 (9th Cir. 1984)). Quite simply, when the Defendant chooses the venue, the
10 Defendant should not be permitted to complain if he regrets his choice.

11 Under the UDRP Rules, Defendant is required to select a mutual jurisdiction in which it
12 will submit to any challenges to the UDRP proceeding. UDRP Rule 3(b)(xiii) requires that the
13 Complainant:

14 State that Complainant will submit, with respect to any challenges to a decision in
15 the administrative proceeding canceling or transferring the domain name, to the
16 jurisdiction of the courts in at least one specified Mutual Jurisdiction.

17 In order to comply with this requirement, Defendant had the option of choosing to submit to
18 disputes either a) where the registrant lives (in this case, California) or b) where the domain
19 name registrar is (in this case, Arizona). Presumably, Defendant considered these two options
20 and chose the one it found most convenient, or least likely to be convenient to Mr. Lurie.

Although Defendant may now regret its prior jurisdictional choice, its UDRP Complaint filed as an exhibit to the Complaint (Doc. # 1-2) shows that it clearly selected it:

[11.] MUTUAL JURISDICTION

The Complainant will submit, with respect to any challenges to a decision in the administrative proceeding canceling or transferring the domain name, to *[choose one jurisdiction]*:

 X a) the location of the principal office of the concerned registrar or

_____ b) where the Respondent is located, as shown by the address(es) given for the domain name holder in the Whois Database at the time of the submission of the Complaint to FORUM. UDRP Rule 3(b)(xiii).

As acknowledged two pages earlier in the same UDRP Complaint, Defendant was well aware that the concerned registrar in this case, GoDaddy.com, Inc., has its principal office in this judicial district:

[6.] DISPUTED DOMAIN NAME(S)

[a.] The following domain name is the subject of this Complaint: UDRP Rule 3(b)(vi).

airfx.com

[b.] Registrar Information: UDRP Rule 3(b)(vii).

[i.] Registrar's Name: *GoDaddy.com, Inc.*

[ii.] Registrar Address: *14455 N. Hayden Rd, Ste. 219, Scottsdale, AZ 85260*

[iii.] Telephone Number: *(480) 505-8899*

[iv.] E-Mail Address: *unknown*

[v.] Fax: *(480) 505-8844*

The Defendant asked that this case be brought here, and the Defendant must live with that choice. Defendant may now suffer from forum selection remorse, but this is a self-inflicted wound to which the Court should not properly tend.

Hamstrung by the Defendant's forum selection, the Plaintiff had no choice but to bring this case in Arizona. A Complaint to stop the transfer or cancellation of a domain name **must** be brought in the proper jurisdiction, making the UDRP Rules' mutual jurisdiction requirement particularly important. *See* UDRP Rules ¶ 4(k) (requiring legal action to stay implementation of

1 a domain name transfer or cancellation to be brought in a jurisdiction “where complainant has
 2 submitted”); *Barcelona.com*, 330 F.3d at 626-27 (requiring suits to stop domain name transfers
 3 or cancellations to be brought in a jurisdiction where complainant has consented to suit).
 4 Defendant’s selection of this District in the underlying UDRP proceeding not only confers this
 5 Court with jurisdiction over this action, but is essential to specifying from which court Plaintiff
 6 may seek relief; if Defendant had not specified a district to which it consented to jurisdiction, its
 7 UDRP complaint would have been defective. *See Mann*, 2007 U.S. Dist. LEXIS 54582 at * 4-5.
 8 The Defendant *forced* the Plaintiff to bring this action in this District – it should not complain
 9 now that its choice seems inconvenient.

10 Contractual forum selection clauses, which are mutually agreed upon are generally
 11 upheld. “Forum selection clauses ‘should be respected as the expressed intent of the parties.’”
 12 *Swenson*, 415 F. Supp. 2d at 1104 (quoting *Pelleport Investors*, 741 F.2d at 280). They are
 13 presumptively valid, and thus “should be honored ‘absent some compelling and countervailing
 14 reason.’” *Murphy v. Schneider Nat’l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004) (quoting *M/S*
 15 *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)). A
 16 party challenging a forum selection clause “bears a ‘heavy burden of proof.’” *Murphy*, 362 F.3d
 17 at 1140 (quoting *M/S Bremen*, 407 U.S. at 17). A valid forum selection clause “may act as a
 18 waiver to objections to personal jurisdiction.” *Consulting Eng’rs Corp. v. Geometric Ltd.*, 561
 19 F.3d 273, 281 n. 11 (4th Cir. 2009) (citing *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311,
 20 315-16, 84 S. Ct. 411, 11 L. Ed. 2d 354 (1964)). In fact, a forum selection clause, “standing
 21 alone, is enough to confer personal jurisdiction on a nonresident defendant.” *Costar Realty Info.,*
 22 *Inc. v. Field*, 612 F. Supp. 2d 660, 668 (D. Md. 2009) (citing *Burger King Corp. v. Rudzewicz*,
 471 U.S. 462, 472 n. 14, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)).

1 In this case, the forum selection is a bit more extreme than the typical contractual forum
2 selection clause. The parties did not bargain for the decision, but rather it was unilaterally forced
3 upon the Plaintiff by the Defendant. Had Plaintiff initiated this matter anywhere else, the
4 erroneous UDRP decision would have been implemented, the Plaintiff's property would have
5 been transferred to the Defendant, and the Plaintiff would have already lost. In fact, if the Court
6 transfers this action out of this District, the registrar will be permitted to award the domain name
7 to the Defendant. Essentially, if the Court grants Defendant's motion to transfer, it will likely
8 function as a full adjudication of the dispute.

9 Although the Defendant selected this jurisdiction, the Defendant claims that Indianapolis
10 would be more convenient for "every single party and witness" (Doc. # 10 at 9.) However, this
11 statement is as strange as it is unsupportable. A review of the geographic distribution of both
12 parties and nonparties reveals that Indianapolis, Indiana, despite Defendant's unsupported
13 assertions to the contrary, is the least likely place where venue would be proper. Although
14 Defendant maintains a registered office in Indianapolis, its principal – Jeff Schwindt – appears to
15 be employed by a company located in Chicago, Illinois, called Interfere, Inc. d/b/a IPXtract.¹¹
16 IPXtract, in turn, shares the same physical address as Defendant's counsel of record in this
17 matter, in Chicago – not Indianapolis. Most, if not all, of the evidence needed to establish the
18 Plaintiff's claim can be found in California, and primarily within its Central District or adjacent
19 to it, including witness and expert testimony from figures within the skydiving, indoor skydiving
20 and wind tunnel community. Moreover, Plaintiff Lurie, who possesses much of the evidence
21 needed to substantiate his claim, is located in the Central District of California. While Defendant
22

¹¹ See IPXtract "about us" webpage, available at <http://ipxtract.com/about.html> (last visited Sept. 15, 2011).

1 does not reside there, all of the discovery and other evidence the Defendant could need to acquire
2 and review is located there, and therefore would ultimately be the more convenient district.

3 If a transfer were granted at all, it should be to the Central District of California, where
4 the Plaintiff resides, where the Plaintiff would have preferred to bring this case, and where the
5 true injury occurred. The onus should not be on Lurie to travel across the country, to Indiana, to
6 preserve his valid property rights.

7 **V. Conclusion**

8 The Plaintiffs have sufficiently and fully pled their claim for reverse domain name
9 hijacking under 15 U.S.C. § 1114(2)(D)(v) against the Defendant, including each element within
10 that cause of action. In particular, the Plaintiffs have sufficiently pled, if not proven
11 conclusively, that they are not in violation of the ACPA, as required to sustain a reverse domain
12 name hijacking claim. Upon the Court's denial of Defendant's Motion to Dismiss, the
13 Defendant is not entitled to have the case transferred to a different venue. In addition to
14 consenting to this Court's jurisdiction, such a venue transfer is both unnecessary and inequitable.
15 The Defendant's Motion (Doc. # 10) must fail on all counts.

16 Dated this 16th Day of September, 2011.

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